

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 456 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
  5. Whether it is to be circulated to the Civil Judge? : NO

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C C I PRODUCTS

Versus

DIRECTOR GENERAL

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Appearance:

MR MI PATEL for Petitioner

MR KATTHA GAJJAR ASSI GOVERNMENT PLEADER for Respondent

No. 1

MR RM DESAI for Respondent No. 2

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CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 06/10/2000

ORAL JUDGEMENT

1. The petitioner has filed this petition under Article 226 of the Constitution of India for appropriate writ, order or direction for quashing and setting aside the demand order dated 18.11.1987 made by the second respondent placed at Annexure-B to the petition and for further direction preventing the respondents from enforcing the said order and taking further proceedings pursuant thereto against the petitioner.

2. The facts may be briefly states as follows :

As per the case of the petitioner, first respondent had invited the tenders for supply of drugs and medicines that may be required to be used in the hospitals and dispensaries in various States maintained by the Corporation for the period from 1.7.1986 to 30.6.1987. The petitioner had also submitted its tender for the supply of Theophylline Liquid each 15 ml to contain Theophylline BP 80 mg. in Hydroalcoholic solution and after scrutinising the tenders received by the respondents, the respondents accepted the tenders of the petitioner by order dated June 30, 1986. That accordingly, the said solution was supplied by the petitioner to the respondents. The terms and conditions of the contract provided that the contracted items would be supplied all through out the country on demand made by any of the Chief Direct Demanding Officer and the Chief Demanding Office were authorized to operate the said rate contract. The petitioner submits that the said solution was supplied accordingly by the petitioner to the respondents in accordance with the requirement placed by the said Demanding Officer.

3. As per the case of the petitioner, second respondent subsequently informed the petitioner that the goods supplied by the petitioner were not of prescribed standard and quality as per the report of the Government Analyst, Drug Laboratory, Baroda. Consequent to which, the petitioner objected to the said report and informed respondent no.2 that the petitioner had got the produce in question tested repeatedly and it was found that the product contained Theophylline within the prescribed limit. The petitioner also objected to the method of analysis adopted by the said Laboratory at Baroda. Thereafter, the petitioner requested the second respondent to get the same produce analyzed as per new method of analysis supplied by the petitioner. That thereafter, some correspondence ensued between the parties. However, the second respondent instead on getting the produce analyzed according to the new method, the respondents by his demand order dated November 18,

1987 requested the Collector, BDS (Recovery Branch) Bombay to recover an amount of Rs. 1,11,659-37 ps. by the process of land revenue recovery from the petitioner treating the same as arrears of land revenue under the provisions of the Maharashtra Land Revenue Code. In the mean time, the petitioner had preferred the appeal against the report of the Drugs Laboratory at Baroda for retesting the sample of the product of the petitioner and the contentions raised by the petitioner was accepted by the appellate authority and the Drug Laboratory was directed to carry out a fresh test of the samples as per the analytical method supplied by the petitioner. The petitioner further says that the Drug Laboratory, Baroda has not so far retested the samples of the product and has not given its final report and therefore, during the pendency of the said matter with the said laboratory, the respondents could not proceed further with the recovery proceedings.

4. The petitioner has further claimed that the respondents are not entitled to recover the amount in question as arrears of land revenue. It has also been contended that the contract between the parties is itself in the clear terms that in case of dispute, the matter shall be referred to the arbitration. That in the present case, the respondents have not referred the matter to the arbitration and therefore, the action on the part of the respondents in effecting the recovery for the amount in question is against the provisions of the law. The petitioner has therefore pleaded that the said action on the part of the respondent is illegal and without jurisdiction. The petitioner therefore has prayed for appropriate writ, order and direction for quashing and setting aside the demand order dated 18.11.1987 made by the second respondent which is placed at Annexure-B to the petition and has further prayed for directions against the petitioner restraining them from enforcing the said order and taking further actions pursuant to the said order against the petitioner.

5. Notice was issued to the respondents and the respondents have filed the affidavit of Dr. Pravin J. Tripathi, Director of Medical Services - Respondent No.2 which is at page 31. The respondents have contended that the allegations made by the petitioner are not correct. That the second test was carried out and even in the second test, the goods in question was not found according to the standard laid down. That was no question of referring the dispute to arbitration. They pray for dismissal of the petition being without foundation and void of merits.

6. I have heard the learned counsel for the petitioner and Ms. Kattha Gajjar, learned AGP for the respondents.

7. It has been vehemently contended on behalf of the petitioner that there is a clear provision in contract for referring the matter to the arbitration. The learned counsel appearing for the petitioner has relied upon Annexure-A which is at page-19. It is a document containing terms and conditions of the contract. The learned advocate for the petitioner referred to Clause 35 which is at page 24. Clause 35 referred to above is reproduced hereunder for the same of convenience;

"35 Arbitration

In the event of any question, dispute or difference arising under these conditions or any special conditions of contract or in connection with this contract except as to any matters the decision on which is specially provided for by these or the special conditions, the same shall be referred to the sole arbitration of the Director General, Employees' State Insurance Government / Corporation Servant, that appointed by him. It will be no objection that the arbitration is Government / Corporation Servant, that he had to deal with the matters to which the contract relates or that in the course of his duties as to Government Corporation servant he had expressed views on all or any of the arbitration dispute or differences. The award of the arbitration shall be final and binding on the parties to this contract.

It is a terms of this contract :

- (a) If the arbitration be the Director General, Employees' State Insurance Corporation.
- (b) In the event of his being transferred or vacating his office by resignation or otherwise, it shall be lawful for his successor - in - office either to proceed with the reference himself, or to appoint another person as arbitration ; or
- (c) In the event of his becoming unable to act, for any reasons, it shall be lawful

for the Director General of Employees' State Insurance Corporation to appoint another person as arbitrator.

- (d) If the arbitration be a person, appointed by the Director, General Employees' State Insurance Corporation."

8. Now, it can be gathered that there is a provision for arbitration under Clause 35 of the said contract. However, there is no material on record to show that the petitioner had made any representation, request or application to the respondents referring the matter to the arbitration. It seems that the analysis test which was referred to by the petitioner, was carried out and the report so given was also against the petitioner. There was some correspondence between the parties and yet the petitioner never requested the respondents to refer the matter to the arbitration. Therefore, when there was no request, even by the petitioner for referring the matter to the arbitration, it would not be open now to the petitioner to challenge the recovery proceedings on the ground that the matter has not been referred to arbitration.

9. Even otherwise, it seems from the record that samples in question was first tested at the instance of the respondents. The report was against the petitioner and therefore, at the instance of the petitioner second test was also carried out and even the second report also weighed against the petitioner, therefore, reasonable opportunity seems to have been given to the petitioner. In that view of the matter, no prejudice has been caused to the interested of the petitioner by not referring the matter to the arbitration.

10. It is pertinent to note that the petitioner has never prayed for referring the matter to the arbitration and there is no material shown to me which could show that such a request was made by the petitioner to the respondents. The learned AGP appearing on behalf of the respondents has made a clear statement that no such request, representation or application was received by the respondents from the petitioner for having reference of the matter of dispute to the arbitration. Therefore, on the one hand, there was no prayer for reference to the arbitration and on the other hand, no prejudice is proved to have been caused to the petitioner by not referring the matter to the arbitration. In that view of the matter, it would now be open to the petitioner to raise this grievance before this Court in this application.

11. The second contention raised on behalf of the petitioner is that the respondents Corporation is not entitled to effect the recovery of the amount in question as arrears of land revenue. On this aspect, it would be worthwhile to refer to the provisions contained in the Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act"). Sections 45 B, 45 C, 45 D runs as under :

S.45 B Recover of contribution :- Any contribution payable under this Act may be recovered as an arrears of land revenue.

S.45 C Issue of certificate to the Recovery Officer : .....

S.45 D Issue of certificate to the Recovery Officer :

(1) Where any amount is in arrears under this Act, the authorized officer may issue, to the recovery officer, a certificate under his signature specifying the amount of arrears and the Recovery officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the factory or establishment or, as the case may be, the principal or immediate employer by one or more of the mods mentioned below :-

(a) attachment and sale of the movable or immovable property of the factory or establishment or, as the case may be, the principal or immediate employer;

(b) arrest of the employer and his detention in prison;

(c) appointing a receiver for the management of the movable or immovable properties of the factory or establishment or, as the case may be, the employer;

....."

So these provisions make it clear that additional weapon has been given to the respondent Corporation for effecting speedy recovery.

12. The learned AGP has also placed on record a

letter dated 17th August, 1993 received from the office of the Government Pleader, High Court of Bombay stating that the matter was heard by a Division Bench of the High Court of Bombay. The recovery notice issued by the Corporation under the Revenue Recovery Act, 1890 was questioned. There a plea was raised that the corporation had no power to invoke the revenue recovery under the Act of 1890 and the said Act does not empower the corporation to issue such notice at the relevant time. It was also pointed out that in 1989, the aforesaid amendment was carried out in the said Act and therefore, the recovery could not be prosecuted under the Revenue Recovery Act. The said letter says that the Hon'ble Judges of the said Court had upheld that such amendment should be treated as retrospectively applicable and upheld the contention of the Corporation. I do not have the copy of the said judgement of the Bombay High Court referred to in the said letter, therefore, it would not be possible to go into the detailed discussion thereof.

13. However, this is the procedural aspect and instead of going for a lengthy procedure of filing the civil suit, the Corporation appears to have restored to speedy remedy. Any way, the respondent Corporation was armed with the additional weapon and therefore, I am of the view that when the matter has been pending since long and when at least since 1989 - the respondent corporation is not in position to effect the recovery as arrears of land revenue, I do not find that it would be just and proper to interfere with the said proceedings at this stage as late as in the year 2000. In other words, the said action cannot be treated as illegal on said consideration.

14. So far as the contract is concerned, the clause 15 is amply clear on the point. Sub Clause 2 of Clause 15 states that if any stores supplied are found to be not as per the specifications or standard on inspection or analysis by the competent authority, contractor will be liable to replace the entire quality or make full payment of the entire consignment against a particular invoice irrespective of the fact that the part of the supplied stores might have been consumed.

15. So far as the stock supplied is concerned as per the analysis undertaken as the goods were not according to the standard. There, the quality of the commodity supplied by the petitioner did not stand to the standard.

16. It is pertinent to note that the report was communicated to the petitioner and the petitioner was

very well aware of the fact that the commodities supplied by the petitioner did not stand to the standard. The report has been placed at page 41 and it clearly indicates that the sample does not conform to the claim made on the label (1) content of Theophylline.

17. The petitioner contended that test was not properly carried out and there was every likelihood that some mistake might have taken place. There is no reason to infer accordingly. Hence, it is required to be upheld that the commodities supplied by the petitioner were not of prescribed standard quality and therefore, the respondents were perfectly justified in invoking the provisions of Clause 15 of the Contract. Therefore, no illegality is proved to have been committed by the respondents in effecting the said recovery.

18. An attempt was made to argue that the method adopted by the Laboratory for carrying out chemical test was not proper and the petitioner had objected to the said method and had suggested that the commodities be tested through another new method. The respondents have made it clear that the petitioner never provided new method for chemical analysis. There is nothing on record to show that the petitioner had supplied the process of such a new method for chemical analysis of the said commodity. Mere averment that the method of analysis is improper and hence new method should be adopted is quite insufficient. The petitioner should have provided alternative process or procedure on which the petitioner wanted to rely. In absence of any action on the part of the petitioner in his behalf, no grievance can be entertained by this Court in this petition.

19. It shows that the petitioner got the sample tested through another laboratory but that was too late. By the time, the reports were received, the expiry date had already passed and hence the respondents could not use the said commodity after the passage of expiry date.

20. This would show that even these points do not go to help the petitioner. The result is that the petition fails on all these points. It has not merit. It therefore deserves to be dismissed.

21. This petition is accordingly dismissed. Rule stands discharged. No order as to costs.



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